

Letter of Findings: 07-0508
Gross Retail Tax
For the Years 2004, 2005, and 2006

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ISSUE

I. Display Packaging – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(b); IC § 6-2.5-5-9(d); *Indiana Dep't. of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003); [45 IAC 2.2-5-8\(j\)](#).

Taxpayer challenges the Department of Revenue's decision that it was subject to use tax on the cost of display packaging which it provides to retailers of the taxpayer's merchandise.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that produces colognes, creams, and lotions. Taxpayer acts as a wholesaler selling and shipping its products to its retailer/customers. The Department of Revenue conducted an audit review of taxpayer's records and concluded that taxpayer owed use tax on the cost of various display items which it furnishes to its retailer/customers. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for its protest. This Letter of Findings results.

I. Display Packaging – Gross Retail Tax.

DISCUSSION

All tax assessments are presumed to be accurate. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.* Exemption statutes are to be strictly construed against the Taxpayer. *Indiana Dep't. of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248, 250 (Ind. 2003).

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. IC § 6-2.5-2-1. Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a).

Taxpayer disagreed with the Department's decision that it should have self-assessed use tax on the cost of display materials which it furnishes without cost to its retailer/customers. As described in the audit report, "In order to promote and market their product, the taxpayer provides promotional items to their retailers. The taxpayer 'sells' display packages to their retailers; however, upon examination it was shown that these packages are itemized to the retailers. Retailers are only being charged for the product to stock the display." The audit concluded that the display packages were subject to use tax under [45 IAC 2.2-5-8\(j\)](#) which states as follows:

Machinery, tools, and equipment used in managerial sales, research, and development, or other non-operational activities, are not directly used in manufacturing and, therefore, are subject to tax. This category includes, but is not limited to, tangible personal property used in any of the following activities: management and administration; *selling and marketing; exhibition of manufactured or processed products;* safety or fire prevention equipment which does not have an immediate effect on the product; space heating; ventilation and cooling for general temperature control; illumination; heating equipment for general temperature control; and shipping and loading. (*Emphasis added*).

Taxpayer disagrees and argues that the display packaging is exempt from sales tax as nonreturnable packaging pursuant to IC § 6-2.5-5-9(d) as follows: "Sales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds."

Taxpayer states that the display packaging "[is] necessary to ship and display the products at retail in a manner that protects the product in transit, is efficient from a material handling standpoint at the retail store, and makes it easy for retailer to set up the [taxpayer's] product offerings." Taxpayer uses the term "pre-packs" to designate the disputed items and describes their function as follows: "The total package is removed from the shipping carton and place[d] on the shelf ready for sale."

There is no dispute that taxpayer's products are sorted and pre-arranged within the display packaging, that the display packaging is contained within a shipping carton, that the display packaging is provided free to the retailer/customers, and that the display packaging is typically used by the retailer/customers to exhibit the taxpayer's products at the "point-of-purchase."

The Department is unable to agree that the taxpayer has met its burden of demonstrating that display packaging is properly categorized as non-returnable packaging because the primary function of the disputed items is to serve as a "point-of-purchase" display for taxpayer's goods. As such, the display packaging best falls under the category of taxpayer tangible property provided for "selling and marketing; exhibition of manufactured or

processed products...." [45 IAC 2.2-5-8](#)(j). Presumably, the shipping cartons within which the display packaging is contained are exempt, but these shipping cartons are not at issue. Taxpayer is not entitled to the exemption which it seeks.

FINDING

Taxpayer's protest is respectfully denied.

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